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APPENDIX TO BRIEF FOR APPELLANTS

In the
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 7418.

HENRY THOMAS HAILE, JR., individually, and as Administrator of the Estate of AGNES LEWIS HAILE, Deceased; MELVIN THOMAS HAILE, a minor, suing by next friend and father, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, a minor, suing by next friend and father, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE,

Appellants,

versus

OSLEY BIRD SAUNOOKE; BERTHA SAUNOOKE; THE EASTERN BAND OF CHEROKEE INDIANS, a corporation; and the UNITED STATES, in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof,

Appellees.

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for the Fourth Circuit

No. 7418.

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versus

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Appellees.

APPENDIX TO BRIEF FOR APPELLANTS

COMPLAINT

I

Henry Thomas Haile, Jr., who is a citizen and resident of Hamilton County, Tennessee, individually and as administrator of the estate of his deceased wife, Agnes Lewis Haile, at the time of her death also a resident of Hamilton County, Tennessee; Melvin Thomas Haile, a minor, age fourteen, a resident of Hamilton County, suing by next friend and father, Henry Thomas Haile, Jr.; Carolyn Darlene Haile, a minor, age six, a resident of Hamilton County, Tennessee, suing by next friend and father, Henry Thomas Haile, Jr.; Mrs. Gertrude L. Haile, a resident of Hamilton County, Tennessee; Henry Thomas Haile, a resident of Hamilton County, Tennessee; and Ora Ellen Smith, a resident of Hamilton County, Tennessee; as Plaintiffs, sue Osley Bird Saunooke, who is a citizen and resident of Jackson County, North Carolina; Bertha Saunooke, wife of Osley Bird Saunooke, and also a citizen and resident of Jackson County, North Carolina; the Eastern Band of Cherokee Indians, a corporation incorporated under the laws of, and with a charter from the State of North Carolina, and doing business in Jackson County, North Carolina; and the United States, in its capacity as government and also in its capacity as trustee for and guardian of the Eastern Band of the Cherokee Indians and the individual members thereof.

II

The ground upon which jurisdiction of the Court depends insofar as Osley Bird Saunooke, Bertha Saunooke, and the Eastern Band of Cherokee Indians are concerned is diversity of citizenship between the parties.

62 Stat. 930; 28 USC 1332

III

The grounds upon which the jurisdiction of the Court depends insofar as the United States is concerned are contained in U.S.C., Title 28, Sec. 1346(b).

60 Stat § 43 c. 753 as amended

IV

The amount in controversy as to each plaintiff exceeds Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

V

On or about July 3, 1955, plaintiffs were severely injured when a swinging bridge, upon which they were walking, fell and threw them onto the rocks in a stream below, in one disastrous moment turning their family weekend vacation into a nightmare horror which saw the death of Agnes Lewis Haile, and the serious injury of all the plaintiffs.

VI

The bridge upon which this tragedy occurred was located in Jackson County, North Carolina, a short distance north of Cherokee. It led from the main highway across a stream to a tourist attraction owned and operated by the defendant, Osley Bird Saunooke, Chief of the Eastern Band of Cherokee Indians, and Bertha Saunooke, and was the principal means of access to this place of business. Extensive advertising by the Eastern Band of Cherokee Indians attracted thousands of tourists to this area daily, and signs erected by Chief Saunooke and his wife invited the public to use

the bridge and visit the premises operated by these defendants.

VII

The bridge was originally constructed by the United States, at the request of and for the benefit of the defendant, the Eastern Band of Cherokee Indians, and the defendants, Osley Bird Saunooke, and wife, utilized the bridge for commercial purposes as the principal means of access to their place of business, and said bridge was under the exclusive care and control of the defendants.

VIII

The defendants, Osley Bird Saunooke and wife, were guilty of negligence which proximately caused or contributed to the accident aforesaid in one or more of the following respects:

(1) In utilizing this bridge as the access to their tourist attraction when they knew, or in the exercise of ordinary care should have known, that it was unsafe;

(2) In failing to make adequate inspections of said bridge, which would have disclosed the imminent peril;

(3) In failing to make proper repairs to said bridge so as to cure the defects therein;

(4) In failing to properly control the flow of pedestrians onto the bridge so as to limit the load thereon from exceeding safe limits;

(5) In failing to post and keep posted signs warning the public of the danger;

(6) After they realized, on the day of the accident aforesaid, either themselves or through their agents and servants, that the bridge was in imminent danger of collapse, in failing to take any steps to avert the danger.

(7) In failing to provide a safe means of ingress and egress for those invited to their place of business.

IX

The Eastern Band of Cherokee Indians was beneficial owner of the land upon which the bridge was situated and had full knowledge or was chargeable with knowledge of the unsafe condition of the bridge, the use to which the bridge was being put, and of the danger to the tourists attracted there. By virtue of its charter of incorporation, as amended from time to time, this corporate defendant was charged with the duty of directing the management, control, and use of this property. Osley Bird Saunooke and wife operated their concession only by virtue of a revocable permit from this corporation defendant, which had the right and duty to require that such operation be conducted in such a manner as to insure the safety of the thousands of tourists attracted to the area by the advertisements and lures of this corporate defendant. The Eastern Band of Cherokee Indians had developed the entire area surrounding the scene of the accident into a vast commercial tourist attraction, to which it solicited travelers for the monetary gain of this corporate defendant as well as that of its individual members. By Tribal custom, the Band has the right to control the operations of the various individual members of the Band, including Osley Bird Saunooke and wife, and this right carried a corresponding duty toward the invited public.

X

The defendant, Eastern Band of Cherokee Indians, was guilty of negligence which proximately caused or contributed to the accident aforesaid in one or more of the following respects:

(1) In failing to take any steps to correct the dangerous conditions created through the negligence of Osley Bird Saunooke and wife, as set forth above, of which the Band knew or in the exercise of ordinary care should have known;

(2) In allowing the original construction of the bridge to be done in a negligent manner so as to render it unsafe;

(3) In failing to make adequate inspections of the bridge, which would have disclosed the imminent peril;

(4) In failing to make proper repairs to said bridge so as to cure the defects therein;

(5) In failing to properly control the flow of pedestrians onto the bridge so as to limit the load thereon from exceeding safe limits;

(6) In failing to revoke the permit allowing Osley Bird Saunooke and wife to operate their concession after it knew or in the exercise of ordinary care should have known of the negligent manner of their operation;

(7) In failing to post, and keep posted, signs to warn the public of the danger;

(8) In permitting the bridge, which was the property of the corporate defendant, to be used for a pur-

pose for which it was not constructed and for which it was unsafe and dangerous;

(9) In failing to use reasonable care and caution for the protection of the plaintiffs in the use of the bridge.

XI

The United States had and now has legal title to the land upon which the bridge was erected and held this title as trustee for the Eastern Band of Cherokee Indians. Also, the United States has been and is guardian for the Eastern Band of Cherokee Indians and the individual members thereof, including Osley Bird Saunooke and wife. The United States had placed a superintendent in the employ of the United States, near Cherokee, North Carolina, whose office was but a short distance from the scene of this accident, and it was made his duty, by Acts of Congress, regulations of the Department of the Interior, and decisions of the United States Courts, to supervise and control the Indian affairs, which included the supervision and control of this particular piece of property where the accident occurred. Particular reference is made to *U.S.C.*, Title 25, Sec. 31; *U.S.C.*, Title 25, Sec. 67; and the 1950 Reorganization Plan No. 3, effective May 24, 1950, 15 FR 3174, 64 Stat. 1262 (see USCA, Title 5, Sec. 481); U.S.C., Title 25, Sec. 306a; as well as general references to all the provisions of Title 25, U.S.C., as imposing duties upon the United States with reference to the ownership, control, and supervision of Indians' land and affairs. The United States, through its agents, failed to properly supervise and control Osley Bird Saunooke and wife, Bertha Saunooke, and the Eastern Band of Cherokee Indians, with regard to their inspection, maintenance, and repairs of this bridge, and

also with regard to their posting of warning signs and control of the flow of traffic on said bridge, and this failure upon the part of the United States proximately caused or contributed to the accident aforesaid. In addition, the United States itself failed to make proper construction, inspections, maintenance, and repairs of said bridge, or to control the flow of traffic thereon, or to post signs warning of the danger. The United States permitted the bridge to be used for a purpose which rendered it inadequate, unsafe, and dangerous, and all of these omissions also proximately caused or contributed to the accident.

FIRST COUNT

The plaintiff, Henry Thomas Haile, Jr., incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Henry Thomas Haile, Jr., was thrown with great violence onto the rocks in the stream below the bridge. He was knocked unconscious, taken to the Swain County Hospital, Inc., at Bryson City, North Carolina, and hospitalized for one week. In addition to numerous bruises all over his body and extreme shock caused by the accident and tragedy, he sustained a crushed extensive fracture of the right shoulder blade, lacerations about the head, and contusion of the right kidney. Plaintiff incurred heavy expenses, not only for his own medical treatment, but also for his two minor children, who were injured in the same accident, and for the funeral expenses of his wife, who was killed in the accident, and of whose companionship and services plaintiff has been thereby deprived.

In addition, since the accident, plaintiff has been unable to operate his restaurant at Daisy, Tennessee, as a result of his injuries, and has sustained loss of profits thereby. He has been incapacitated to work, and his injuries will probably result in permanent disability, the extent of which can not be determined fully as of now. All to his great damage in the sum of Forty-five Thousand Dollars ($45,000.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason plaintiff should recover an additional Forty-five Thousand Dollars ($45,000.00).

SECOND COUNT

I

The plaintiff, Henry Thomas Haile, Jr., administrator of the estate of Agnes Lewis Haile, deceased, incorporates herein by reference Paragraphs I through XI, above.

II

Agnes Lewis Haile, wife of Henry Thomas Haile, Jr., died as a result of the injuries she received in this accident. Plaintiff has qualified as administrator of her estate, a certified copy of his letters of administration being attached hereto as Exhibit "A".

III

Plaintiff, as administrator, therefore, sues for her funeral expenses, for the pain and suffering she suffered prior to her death, and for the loss of her life, all to his great damage

in the sum of Thirty-five Thousand Dollars ($35,000.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason plaintiff should recover an additional Thirty-five Thousand Dollars ($35,000.00).

THIRD COUNT

I

The plaintiff, Mrs. Gertrude L. Haile, incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Mrs. Gertrude L. Haile, age sixty-one (61), was thrown with great violence onto the rocks in the stream below the bridge. She was rendered unconscious for the better part of two days and was taken to Swain County Hospital, Inc., where she remained for twenty (20) days. She suffered numerous bruises and abrasions about her entire body and upon admission to the hospital was suffering such severe shock she had to receive intravenous fluids and blood. In addition, she sustained an acute, complete, severe, segmental fracture of the lower left humerus (which is the upper bone of the arm), and an acute, complete, severe compression fracture of her third lumbar vertebra. She had a cast on her arm and another about her body when she was removed from the hospital to her home by ambulance. She was subsequently placed in Memorial Hospital, at Chattanooga, Tennessee, for nine (9) days, where an operation was performed on her arm in the nature of an open reduction and dual Rush

nail fixation, at which time compression of the radial nerve was relieved by surgical intervention. Plaintiff will have to undergo extensive and plainful rehabilitation treatment and will be seriously and permanently disabled to an extent not now determined, all to her great damage in the sum of Forty-five Thousand Dollars ($45,000.00). That the acts of negligence on the part of the defendants, other than the United States were wilful and wanton, as hereinafter alleged, and for said reason, plaintiff should recover an additional Forty-five Thousand Dollars ($45,000.00).

FOURTH COUNT

I

The plaintiff, Henry Thomas Haile, incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the injuries sustained by his wife, Gertrude L. Haile, the plaintiff, Henry Thomas Haile, has expended and become liable for large sums for medical treatment and has lost, and will continue to lose the companionship and services of his wife, all to his great damage in the amount of Three Thousand Dollars ($3,000.00). That the acts of negligence on the part of the defendants, other than the United States were wilful and wanton, as hereinafter alleged, and for said reason, plaintiff should recover an additional Three Thousand Dollars ($3,000.00).

FIFTH COUNT

I

The plaintiff, Ora Ellen Smith, incorporates herein by reference Paragraphs I through XI above.

II

As a result of the accident, the plaintiff, Ora Ellen Smith, age 65, was thrown with great violence onto the rocks in the stream below the bridge. She was hospitalized at the Swain County Hospital, Inc. for twenty (20) days. In addition to numerous bruises and abrasions about her entire body and a state of shock as a result of the accident, she also sustained a severely crushed fracture of the neck of the right humerus (upper bone of the arm), with resulting displacement of bony fragments. She also sustained severe lacerations of the scalp requiring many stitches, severe contusions of chest and back, fractures of her 5th and 8th right ribs, complicated by pleural reaction over the right apex and extending down to the 2nd rib. The plaintiff has incurred and will continue to incur heavy medical expenses and will have to undergo extensive and painful rehabilitation treatment. Plaintiff will sustain permanent disability to an extent not yet determined, all to her great damage in the sum of Twenty-five Thousand Dollars ($25,000.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason plaintiff should recover an additional Twenty-five Thousand Dollars ($25,000.00).

SIXTH COUNT

I

The plaintiff, Melvin Thomas Haile, suing by next friend and father, Henry Thomas Haile, Jr., incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Melvin Thomas Haile, was thrown with great violence onto the rocks in the stream below the bridge. He was hospitalized at Swain County Hospital, Inc., for two (2) days. He sustained bruises and abrasions over his entire body, shock which was aggravated by the death of his mother and injury to other members of his family, and a severe laceration of his head, all to his great damage in the amount of Four Thousand Seven Hundred Fifty Dollars ($4,750.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason, plaintiff should recover an additional Four Thousand Seven Hundred Fifty Dollars ($4,750.00).

SEVENTH COUNT

I

The plaintiff, Carolyn Darlene Haile, suing by next friend and father, Henry Thomas Haile, Jr., incorporates by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Carolyn Darlene Haile, was thrown with great violence onto the rocks in the stream below the bridge. She was hospitalized at the Swain County Hospital, Inc., for five (5) days. She sustained contusions, bruises and abrasions over her entire body, shock which was aggravated by the death of her mother, and injury to the other members of her family, severe abrasions of the chin, nose, and forehead, and hematoma of her leg, all to her great damage in the sum of Four

Thousand Seven Hundred Fifty Dollars ($4,750.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton as hereinafter alleged, and for said reason, plaintiff should recover an additional Four Thousand Seven Hundred Fifty Dollars ($4,750.00).

EIGHTH COUNT

I

Plaintiffs charge that the acts and omissions of the defendants, Osley Bird Saunooke, Bertha Saunooke, and the Eastern Band of Cherokee Indians, as set forth hereinabove, (the allegations of Paragraphs I through XI being incorporated herein by reference) amounted to such gross negligence and wilful and wanton recklessness as to charge those two defendants with punitive as well as compensatory damages.

WHEREFORE, plaintiffs demand judgments against the defendants for the sum of Three Hundred Twenty-Five Thousand Dollars ($325,000.00) and demand a jury to try the issues when joined.

/s/ FOLTS, FRAMMER, BISHOP & THOMAS
610 James Building
Chattanooga, Tennessee

/s/ UZZELL AND DUMONT
Jackson Building
Asheville, North Carolina

/s/ O. L. ANDERSON
Murphy, North Carolina

Attorneys for Plaintiffs

EXTENSION OF TIME TO ANSWER

Upon a showing by the United States Attorney that the investigation being conducted by the United States in this cause has not been completed and that additional time is required before pleadings can be filed, it is

ORDERED that the United States be and it is hereby granted an extension of time within which to answer or file other pleadings in this cause for a period of sixty days or up to and including the 4th day of May, 1956.

This the 28 day of February, 1956.

/s/ WILSON WARLICK
United States District Judge

ORDER

For good cause shown, the Defendant, The Eastern Band of Cherokee Indians, is hereby allowed an additional sixty (60) days, to and including May 4, 1956, within which to answer or otherwise plead in the above entitled action.

THIS day of March, 1956.

/s/ WILSON WARLICK
United States District Judge

ANSWER OF OSLEY BIRD SAUNOOKE and wife, BERTHA SAUNOOKE

Osley Bird Saunooke and wife, Bertha Saunooke, answering the complaint of the plaintiffs in the above entitled cause say:

1.

That these answering defendants Osley Bird Saunooke and wife, Bertha Saunooke, admit that they are citizens and residents of Swain County, North Carolina. That as to the other averments of plaintiffs in paragraph one, these defendants do not have sufficient information or knowledge to form a belief.

2.

These defendants do not deny the averments set out in paragraph two of the complaint.

3.

The averments of paragraph three of the complaint do not affect these defendants.

4.

The plaintiffs are demanding by their complaint an amount in excess of Three Thousand ($3,000.00) each. These defendants specifically deny that they are indebted to any of the plaintiffs.

5.

These defendants admit that a swinging bridge identified in the complaint fell on or about July 3, 1955. These defendants are without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph five of the complaint.

6.

These defendants admit that the bridge which fell was located in Swain County, North Carolina, and that these defendants operated a business adjacent to one end of the bridge. Defendants specifically deny that the swinging bridge was the principal means of access to their business, or that they erected signs inviting the public to use the bridge. Such other averments of paragraph six of the complaint as set forth, do not affect these defendants.

7.

These defendants specifically deny that they utilized the bridge for commercial purposes, as the principal means of arriving to their place of business, and that said bridge was under their care and control, and deny that the bridge was originally constructed at their request or for their benefit.

8.

That the averments of paragraph eight are denied.

9.

Those averments of paragraph nine which pertain to these defendants are denied.

10.

That the averments of paragraph ten of the complaint do not pertain to these defendants.

11.

The averments of paragraph eleven of the complaint do not pertain to these defendants.

12.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of Counts First through Eight of the complaint, except they specifically deny any negligence, and particularly deny any wilful or wanton negligence.

13.

The complaint fails to state a claim against these defendants upon which relief can be granted.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs had knowledge of and assumed risks incidental to their going upon the swinging bridge, and the injuries alleged to have been sustained arose from and were caused by said risks.

SECOND AFFIRMATIVE DEFENSE

Such injuries as were sustained by plaintiffs as set forth

in the complaint were caused in whole or in part, or were contributed to by their own negligence.

THIRD AFFIRMATIVE DEFENSE

While these defendants deny any negligence, if such negligence should be found, plaintiffs were guilty of contributory negligence, which is pleaded in bar of recover.

/s/ STYLES & STYLES

Attorneys for Osley Bird Saunooke and wife, Bertha Saunooke

Legal Building, Asheville, N. C.

This 2nd day of March, 1956.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

Civil Action
No. 1544

HENRY THOMAS HAILE, JR., individually and as Administrator of the Estate of AGNES LEWIS HAILE, Deceased; MELVIN THOMAS HAILE, a minor suing by next friend and father, HENRY THOMAS HAILE, JR., CAROLYN DARLENE

HAILE, a minor suing by next friend and father, HENRY THOMAS HAILE, JR., ORA ELLEN SMITH, MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE,
Plaintiffs,

v.

OSLEY BIRD SAUNOOKE; BERTHA SAUNOOKE; THE EASTERN BAND OF CHEROKEE INDIANS, A Corporation; and the UNITED STATES, in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof,
Defendants.

MOTION TO DISMISS AS TO THE UNITED STATES IN THE CAPACITY OF TRUSTEE FOR AND GUARDIAN OF THE EASTERN BAND OF CHEROKEE INDIANS.

The United States of America, by James M. Baley, Jr., United States Attorney, moves the Court to dismiss the complaint against the United States in the capacity of trustee for and guardian of the Eastern Band of Cherokee Indians for the reason that the United States has not consented to be sued in such capacity; and, therefore, this Court is without jurisdiction to grant relief sought by the complaint with respect to any and all moneys or other property, real or personal, held by the United States in trust for the Eastern Band of Cherokee Indians.

The Court is respectfully referred to the following affidavits, which are filed in support of this motion:

(1) the affidavit of Glenn L. Emmons, United States Commissioner of Indian Affairs;

(2) the affidavit of D. Otis Beasley, Administrative Assistant Secretary, United States Department of the Interior; and

(3) the affidavit of W. Barton Greenwood, Assistant Commissioner [Administration] Bureau of Indian Affairs, United States Department of the Interior.

The Court is further respectfully referred to the memorandum of points and authorities also filed in support of this motion.

WHEREFORE, the United States of America moves the Court to issue its order forthwith dismissing the complaint as to the United States in the capacity of trustee for and guardian of the Eastern Band of Cherokee Indians.

/s/ JAMES M. BALEY, JR.
United States Attorney

/s/ HUGH E. MONTEITH
Assistant United States Attorney

Of Counsel:

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ASSISTANT SOLICITOR
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Department of the Interior

(Caption Omitted)

NON-SUIT
ON BEHALF OF HENRY THOMAS HAILE, JR., ADM. OF THE ESTATE OF AGNES LEWIS HAILE, DECEASED

THIS CAUSE coming on for hearing before the undersigned United States District Judge upon motion of the plaintiff, Henry Thomas Haile, Jr., Administrator of the Estate of Agnes Lewis Haile, Deceased, to dismiss this action as in the case of voluntary non-suit;

IT IS, THEREFORE, ORDERED and ADJUDGED that this action in so far as it relates to the case by the Administrator of Agnes Lewis Haile, deceased, be and the same is hereby dismissed without prejudice as in the case of voluntary non-suit.

This the 12 day of November, 1956.

/s/ WILSON WARLICK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
ASHEVILLE DIVISION

Civil Action
No. 1544

HENRY THOMAS HAILE, JR.,
Individually, et al
Plaintiffs,

vs.

OSLEY BIRD SAUNOOKE, et al
Defendants

MOTION

TO: The United States District Judge for the Western District of North Carolina

NOW COME the plaintiffs and all of them, and respectfully show to the court:

1. That this is a civil action for damages on account of negligence, instituted by summons dated January 3, 1956, and filed January 10, 1956;

2. That, thereafter, the defendant, United States of

America, secured an order dated February 28, 1956, extending the time within which to answer to and including May 4, 1956.

3. That, thereafter, a motion was filed, captioned as follows: "Motion to Dismiss as to the United States in the Capacity of Trustee for and Guardian of the Eastern Band of Cherokee Indians."

4. That the motion by the United States as guardian and trustee was granted on the 10th day of December, 1956, and that the plaintiffs duly entered of record their exception to said dismissal.

5. That no pleadings have been filed by the United States of America, and that no extension of time beyond May 4, 1956, has been granted by the court, and that the time for answering by the United States of America has now expired.

6. That no motion by the United States of America has been made pursuant to Rule 6(b) of the Rules of Civil Procedure for an enlargement of the time within which to answer.

WHEREFORE, the plaintiffs respectfully move the court, pursuant to Rule 55, Rules of Civil Procedure:

1. For an order directing that this case be set for hearing in order that the court might hear evidence of plaintiffs establishing their right to relief.

This the 11th day of January, 1957.

/s/ UZZELL AND DUMONT
Counsel for Plaintiffs

(Caption Omitted)

ORDER

This cause coming on to be heard and being heard before the undersigned United States District Judge upon the motion of the defendant, the United States, acting in its sovereign capacity as a government and in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, to dismiss this action as to the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, the Court, after hearing arguments of counsel for the plaintiffs and the defendant and after considering the complaint of the plaintiffs, the motion of the defendant, the affidavits referred to in said motion (being the affidavits of Glenn L. Emmons, United States Commissioner of Indian Affairs, D. Otis Beasley, Administrative Assistant Secretary of the United States Department of the Interior, and W. Barton Greenwood, Assistant Commissioner [Administration] Bureau of Indian Affairs, United States Department of the Interior), makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That by this action the plaintiffs seek to recover damages for alleged injuries sustained by them resulting from the collapse on July 3, 1955 of a certain bridge across the Oconalufty River located on the Qualla Boundary of the Eastern Band of Cherokee Indians, Swain County, North Carolina; that the legal title to said Qualla Boundary upon which said bridge was located was on said date, and still is, vested in the United States in trust for the Eastern Band of Cherokee Indians by virtue of a deed of conveyance executed by the Eastern Band of Cherokee Indians to the United States, which deed bears date of July 21, 1925 and was executed by the Eastern Band of Cherokee Indians and accepted by the United States under the provisions of an Act of Congress passed on June 4, 1924 (43 STAT. 376).

2. That the Congress of the United States and the Executive Branch of the United States Government have continuously recognized the Eastern Band of Cherokee Indians as an Indian Tribe; that, specifically, by an Act of July 27, 1868 (15 STAT. 228) the Congress of the United States directed the Secretary of the Interior to have a new roll of the North Carolina Cherokees prepared, and Section 3 of said Act provides as follows:

> "And be it further enacted that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

That the Indians referred to in said Act are the Eastern

Band of Cherokee Indians, named as one of the defendants herein.

3. That at the time of the institution of this action the Eastern Band of Cherokee Indians was, and still is, an Indian Tribe.

4. That the Congress of the United States has not given its consent for the plaintiffs to institute and maintain this action either against the Eastern Band of Cherokee Indians and the individual members thereof or against the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof.

CONCLUSIONS OF LAW

That the Eastern Band of Cherokee Indians and the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, are clothed with sovereign immunity from suit and cannot be sued without consent duly given by the Congress of the United States; that the Federal Tort Claims Act (28 U.S.C. 1346(b)) does not constitute a waiver of sovereign immunity from suit with respect to the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, and the United States has not consented to be sued in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof.

It is, therefore, ORDERED that the motion to dismiss said action against the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee

Indians and the individual members thereof be and the same is hereby allowed, and said action is hereby dismissed as to the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof; and it is further

ORDERED that the United States in its capacity as a Government be and it is hereby granted sixty (60) days from the date of this order within which to file answer or otherwise plead to the complaint of the plaintiffs.

This the 23 day of January, 1957.

/s/ WILSON WARLICK
United States District Judge

(Caption Omitted)

ORDER

This cause, coming on to be heard before the undersigned United States District Judge upon the motion of the Defendant, the Eastern Band of Cherokee Indians, to dismiss this action as to said Defendant, and being heard, the Court, after hearing argument of Counsel for the Plaintiffs and the said Defendant, and after considering the Complaint of the Plaintiffs, the motion of the Defendant, and the Affidavits referred to in said motion, being the Affidavits of Glenn L. Emmons, United States Commissioner of Indian Affairs, the Affidavit of W. Barton Greenwood, Assistant Commissioner of the Bureau of Indian Affairs, and the Affidavit of D. Otis Beasley, Administrative Assistant Secretary of the Department of the Interior, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) That by this action the Plaintiffs seek recovery of damages from the Defendants for injuries to the Plaintiffs resulting from the collapse on July 3, 1955, of a certain bridge across the Oconalufty River, located on the Qualla Boundary of the Eastern Band of Cherokee Indians in Swain County, North Carolina. The legal title to said Qualla Boundary upon which said bridge was located was on said date, and still is, vested in the United States in trust for the Eastern Band of Cherokee Indians by virtue of a deed of conveyance executed by the Eastern Band of Cherokee Indians to the United States, which deed bears date July 21, 1925, and was executed by the Indians and accepted by the United States under the provisions of Act of Congress passed on June 4, 1924 (43 STAT. 376).

(2) That prior to 1835 the Cherokee Indian Tribe lived in large areas of what are now the States of Tennessee, North Carolina, South Carolina, Alabama and Georgia. By successive treaties beginning with the Treaty of Hopewell in 1785 (7 STAT. 18) and ending with the Treaty of New Echota in 1835 (7 STAT. 478) the possessory right of the Cherokee Tribe over lands in North Carolina was gradually extinguished and all such land was made subject to grant by North Carolina. By the Treaty of New Echota the Tribe agreed to remove from North Carolina westward beyond the Mississippi in consideration of a payment of money by the United States and a grant of land beyond the Mississippi. A large number of Cherokees were moved as a result of the Treaty of New Echota by the United States Government to new lands West of the Mississippi. However, a number of the North Carolina Cherokees were permitted to remain in North Carolina in accordance with Article 12

of the Treaty of New Echota and others hid in the mountains of Western North Carolina and were not moved. By treaty with the Cherokee Indians in 1846 (9 STAT. 871) the United States recognized certain rights in the Cherokees then residing East of the Mississippi River as follows:

> "Article 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in states East of the Mississippi River had, or may have, under the Treaty of 1835 and the supplement thereto."

The Congress of the United States more specifically recognized the rights of the Cherokees residing in North Carolina by Act of July 29, 1848 (9 STAT. 264), which made provision for taking a census of the North Carolina Cherokees and the payment of certain per capita payments. In accordance with this Act the first authentic role of the Eastern Cherokees residing in North Carolina subsequent to the Treaty of 1835 was made and the number entitled to enrolment found to be two thousand one hundred thirty-three. Subsequently, by Act of July 27, 1868 (15 STAT. 228) the Congress of the United States directed the Secretary of the Interior to have a new role of the North Carolina Cherokees prepared and Section 3 of this Act provided as follows:

> "And be it further enacted, that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

Following enactment of this Act the Commissioner of Indian Affairs on November 7, 1868, by letter, advised the Cherokee Indians in North Carolina to organize themselves into a tribal capacity and elect their own officers, and the Eastern Cherokees shortly thereafter on December 9, 1868, at Cheoa, North Carolina, set forth a declaration establishing a simple form of tribal government. Subsequently and on October 13, 1875, at Cheoa Council Ground, the Eastern Band of Cherokee Indians approved a constitution known as the Welch Constitution, which provided for a Tribal Council and the number and qualifications of the members of the Council, a Principal Chief, a Vice Chief, other tribal officials, and the composition of the executive council, and specified that the annual council should be held on the first Monday in October. The Welch Constitution was in operation until the State of North Carolina passed Chapter 211 of the Private Laws of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes." This Act was subsequently amended by Chapter 166 of the Private Laws of 1895, Chapter 207 of the Private Laws of 1899, Chapter 128 of the Private Laws of 1931 and Chapter 39 of the Private Laws of 1933. The Eastern Band of Cherokee Indians has, as provided in the State Charter, elected a Principal Chief, a Vice Chief and a Tribal Council and these officials have directed the business and affairs of the Eastern Band of Cherokee Indians in accordance with tribal ordinances and resolutions adopted by the Tribal Council and approved by the United States Indian Office. By election held on December 20, 1934, the Eastern Band of Cherokee Indians voted by a vote of 700 affirmative votes to 101 negative votes to accept the provisions of the Indian Reorganization Act of June 18, 1934, (48 STAT. 984). On August 28, 1935, the Eastern Band of

Cherokee Indians voted 381 for and 484 against accepting a constitution and by-laws in accordance with Section 16 of that Act.

(3) That subsequent to the Act of July 27, 1868 (15 STAT. 228) the Congress of the United States has enacted many other Statutes relating specifically to the Eastern Band of Cherokee Indians and recognizing their status as an Indian Tribe. As provided in Section 3 of that Act, the Secretary of the Interior has caused the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern Band of Cherokee Indians as of other tribes of Indians. Continuously since the enactment of the Act of July 3, 1868 (15 STAT. 228) until the present time, the Government of the United States, by successive Acts of the Congress of the United States, and by repeated actions of its Executive Branch, acting particularly through the Bureau of Indian Affairs, has recognized the Eastern Band of Cherokee Indians as an Indian Tribe in all respects exactly as other Indian Tribes. Consistently and continuously since that date the legislative and executive branches of the Federal Government have dealt with and exercised supervision over the Eastern Band of Cherokee Indians, in the same manner and to the same extent as over other Indian Tribes. The United States Government holds title to their lands and holds their funds in its treasury as trustee for these Indians. The United States Government maintains an Indian Agency at Cherokee, North Carolina, with a Superintendent in charge thereof under the Bureau of Indian Affairs. The Congress has appropriated substantial Federal funds to be available each year to the Cherokee Indian Agency to pay the costs of administration, education of the Indians, forestry, soil conservation, construction and

maintenance of roads and buildings and other purposes for the welfare of these Indians. These various programs for the fiscal year 1956 will cost approximately $650,000.00 in Federal funds. Through the Cherokee Indian Agency the United States Bureau of Indian Affairs has dealt with the Tribal Authorities of the Eastern Band of Cherokee Indians and has exercised supervisory control over their affairs in such matters as the management and conservation of their resources, the appointment of tribal attorneys, the safe-guarding of Indian lands, the granting of traders' licenses, the making of tribal membership roles, and other matters affecting the welfare of these Indians. Expenditures from the tribal funds of these Indians which are held in the United States Treasury in trust for their benefit are made only after the Tribal Council has adopted a budget for this purpose, which budget has been approved by the Superintendent of the Cherokee Indian Agency and the Bureau of Indian Affairs, submitted to the Federal Bureau of the Budget, and finally authorized by Act of Congress as part of the general budget of the President of the United States for operation of the Federal Government. By these and many other actions both the Congress of the United States and the Executive Branch of the Federal Government have over a long period of years and continuing to the present time dealt with and recognized the Eastern Band of Cherokee Indians as an Indian Tribe within the meaning of the Constitution and Laws of the United States.

(4) That the Congress of the United States has not passed any Act or otherwise taken any action giving its consent that this action may be brought against the Eastern Band of Cherokee Indians.

CONCLUSIONS OF LAW

(1) That the political departments of the Federal Government recognize the Defendant, the Eastern Band of Cherokee Indians, as constituting an Indian Tribe, and it is a rule of the Courts, in matters of this kind, to follow the action of the Congress and the Executive Departments whose duty it is to determine such affairs. Applying this principle, it has now been conclusively established by a long line of decisions of the Circuit Court of Appeals that the Defendant, the Eastern Band of Cherokee Indians, is an Indian Tribe within the meaning of the Federal Constitution and the Laws of the United States. *United States* vs. *Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States* vs. *Wright*, 53 F. (2d) 301 (C.C.A. 4th, 1931); *United States* vs. *Colvard*, 89 F. (2d) 312 (C.C.A. 4th, 1937); *United States* vs. *7,405.3 acres of land in Macon, Clay and Swain Counties, North Carolina, et al*, 97 F. (2d) 417 (C.C.A. 4th, 1938); *Blair, Superintendent of the Cherokee Indian Agency* vs. *McAlhenny*, 123 F. (2d) 142 (C.C.A. 4th, 1941); *United States* vs. *Partin*, 132 F. (2d) 886 (C.C.A. 4th, 1943).

(2) That Chapter 211 of the Private Laws of North Carolina of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes," as subsequently amended by other Acts of the General Assembly of North Carolina, is operative only in so far as it does not conflict with the rights conferred upon the Eastern Band of Cherokee Indians by the Constitution and Laws of the United States and only in so far as it does not interfere with the supervisory control which the Federal Government exercises over this Indian Tribe. Since the Federal Government has plenary power and control over this Indian Tribe, the State of North Carolina is without power by Act

of its Legislature to authorize suit to be brought against the Defendant, the Eastern Band of Cherokee Indians, or in any other manner to interfere with Federal control over its affairs. *United States* vs. *Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States* vs. *Wright*, 89 F. (2d) 312 (C.C.A. 4th, 1931).

(3) That the Congress of the United States can alone authorize a suit to be brought against an Indian Tribe and that the Defendant, the Eastern Band of Cherokee Indians, is exempt from suit without such congressional authorization. As was said by the Supreme Court of the United States in the case of *United States* vs. *United States Fidelity and Guaranty Co.*, 309 U. S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940):

> "The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."

See also *Thebo* vs. *Choctaw Tribe of Indians*, 66 Fed. Rep. 372 (C.A. 8th, 1895), and *Rollins* vs. *The Eastern Band of Cherokee Indians*, 87 N. C. 229 (1882).

(4) That since Congress has not given its consent that the Eastern Band of Cherokee Indians may be sued in this action, this action must be dismissed as to such Defendant.

IT IS NOW, THEREFORE, ORDERED AND AD-

JUDGED that this action be and the same is hereby dismissed as to the Defendant, the Eastern Band of Cherokee Indians.

THIS 25th day of January, 1957.

/s/ WILSON WARLICK
United States District Judge for the Western District of North Carolina

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(Caption Omitted)

STIPULATION

WHEREAS, there is now pending in the United States District Court for the Western District of North Carolina the following cases:

Mrs. Bessie Adcock v. *Osley Bird Saunooke, et al.*, Docket No. 1564

Robert Manuel Adcock et al. v. *Osley Bird Saunooke, et al.* Docket No. 1551

Herman Brown v. *United States of America, et al.* Docket No. 1601

Evelyn J. Fritts et al v. *Osley Bird Saunooke, et al.* Docket No. 1582

Jessie H. Glazier et al. v. *Osley Bird Saunooke, et al.* Docket No. 1633

William E. Greene, Administrator of the Estate of Ethel Owens Rainwater, deceased v. *Osley Bird Saunooke, et al.*, Docket No. 1584

William E. Greene, Administrator of the Estate of Agnes Lewis Haile, deceased v. *Osley Bird Saunooke, et al.* Docket No. 1634

Henry Thomas Haile, Jr. et al v. *Osley Bird Saunooke et al*, Docket No. 1544

John Lankford et al. v. *Osley Bird Saunooke et al.* Docket No. 1581

Sarah Little et al. v. *Osley Bird Saunooke et al.* Docket No. 1580

Mrs. Alice McMichen v. *Osley Bird Saunooke et al.* Docket No. 1571

Mrs. Verdene Priest v. *Osley Bird Saunooke et al.*, Docket No. 1583

Jimmy Rogers v. *United States of America et al.*, Docket No. 1602

William W. Smith v. *United States of America et al.* Docket No. 1600

Mary Alice Webb et al. v. *Osley Bird Saunooke et al.* Docket No. 1579

WHEREAS, all of said cases are for damages on account of the alleged negligence of the defendants relating to a swinging bridge at Cherokee, North Carolina, and

WHEREAS, motions to dismiss as to part of the defendants have been granted, and notices of appeal have been filed in all of said cases; and

WHEREAS, it is deemed advisable that an appeal should be prosecuted in only one of such cases; and that the decision of the Appellate Court in such case shall govern and be determinative of the question of the proper parties defendant;

NOW, THEREFORE, IT IS STIPULATED AND AGREED that an appeal shall be prosecuted in the case of Henry Thomas Haile, Jr. et al. v. Osley Bird Saunooke, et al., Docket No. 1544, and that the decision in said case by the Appellate Court shall govern and be determinative of the question of the proper parties defendant in all of the above enumerated cases.

This the 8 day of March, 1957.

/s/ JAMES M. BALEY, JR.
United States Attorney
Attorneys for the Eastern Band of Cherokee Indians, a corporation

/s/ UZZELL AND DUMONT
Attorneys for Plaintiffs.

(Caption Omitted)

CONSENT ORDER

Notice of appeal to the Fourth Circuit Court of Appeals from the judgment of this Court dismissing this action in so far as it relates to the Eastern Band of Cherokee In

dians and the United States as guardian of and trustee for the Eastern Band of Cherokee Indians and the individual members thereof, having been filed in the above entitled case and the following other cases arising out of the collapse of a swinging bridge at the Cherokee Indian Reservation, Cherokee, North Carolina:

Robert Manuel Adcock v. *Osley Bird Saunooke, et al.* Docket No. 1551

Mrs. Bessie Adcock v. *Osley Bird Saunooke, et al.* Docket No. 1564

Mrs. Alice McMichen v. *Osley Bird Saunooke, et al.* Docket No. 1571

Mary Alice Webb, et al v. *Osley Bird Saunooke, et al.* Docket No. 1579

Sarah Little, et ano. v. *Osley Bird Saunooke, et al.* Docket No. 1580

John Lankford, et al. v. *Osley Bird Saunooke, et al.* Docket No. 1581

Evelyn J. Fritts, et al. v. *Osley Bird Saunooke, et al.* Docket No. 1582

Mrs. Vardene Priest v. *Osley Bird Saunooke, et al.* Docket No. 1583

William E. Greene, Administrator of the Estate of Ethel Owens Rainwater, Deceased v. *Osley Bird Saunooke, et al.* Docket No. 1584

William W. Smith v. *United States of America, et al.* Docket No. 1600

Herman Brown v. *United States of America, et al.* Docket No. 1601

Jimmy Rogers v. *United States of America, et al.* Docket No. 1602

Jessie H. Glazier, et al. v. *Osley Bird Saunooke, et al.* Docket No. 1633

William E. Greene, Administrator of the Estate of Agnes Lewis Haile, deceased v. *Osley Bird Saunooke, et al.* Docket No. 1634

And the Court being advised, and so finding, that the decision rendered by the Appellate Court, whatever its ruling, may require modification or amendment of the pleadings in the line with a finding as to the proper parties defendant;

And it further appearing that this Court has granted an enlargement of time for sixty (60) days from January 23, 1957 in which the United States is permitted to answer or otherwise plead, and that said enlargement of time has not expired;

It is, therefore, in the discretion of this Court and by consent of all parties, ORDERED, ADJUDGED AND DECREED in this action and in all of the above referred to cases, that the United States as a sovereign power or in its capacity as guardian of and trustee for the Eastern Band of Cherokee Indians or the individual members thereof, shall not be required to answer or file other pleadings herein for a period of sixty (60) days from and after the receipt by the Clerk of the United States District Court for the Western District of North Carolina of the mandate of the Court of Appeals in the case of Henry Thomas Haile, Jr., et al v. Osley Bird Saunooke, et al., Civil No. 1544;

This agreement and order is made without prejudice to any points which may be raised on appeal in the said Haile case and said order shall not constitute a part of the record on appeal.

This the 9 day of March, 1957.

/s/ WILSON WARLICK
United States District Judge

WE CONSENT TO THE ABOVE ORDER:

_____

Attorneys for Plaintiffs

_____

Attorney for Eastern Band of Cherokee Indians

_____

United States Attorney

_____

(Caption Omitted)

ORDER

It appearing to the Court that more than one claim for relief is presented in this action and that this Court has entered a final order dismissing the case as to the United

States in its capacity as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof, and a final order dismissing the action as to the Eastern Band of Cherokee Indians, Inc., a corporation; and it further appearing that the claims as to the United States of America in its sovereign capacity and against Osley Bird Saunooke and wife, Bertha Saunooke, have not been adjudicated; and it further appearing that an appeal has been taken by the plaintiffs from the order dismissing the action as to the Government in its trustee and guardianship capacity and as to the Eastern Band of Cherokee Indians, Inc., and that the ends of justice would require that the propriety of said orders of dismissal should be determined by the Circuit Court of Appeals and that there is no just reason for delaying in making said determination;

It is, therefore, ORDERED AND ADJUDGED that the claims of the plaintiffs as against the United States of America in its trustee and guardianship capacity of the Eastern Band of Cherokee Indians and the individual members thereof and the Eastern Band of Cherokee Indians, Inc., a corporation, be severed from said action for the purpose of appeal in order that an adjudication upon the orders of dismissal may be had, and the plaintiffs are permitted to appeal from the judgment entered upon said severed claims to the Circuit Court of Appeals for the Fourth Circuit; all pursuant to RULES OF CIVIL PROCEDURE 54(b).

This the 11 day of March, 1957.

/s/ WILSON WARLICK
United States District Judge

Office - Supreme Court, U.S.
FILED
OCT 10 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 540

HENRY THOMAS HAILE, JR.; MELVIN THOMAS HAILE, by his next friend, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, by her next friend, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE

Petitioners

-vs-

THE EASTERN BAND OF CHEROKEE INDIANS, a corporation

Respondents

PETITION OF HENRY THOMAS HAILE, JR.; MELVIN THOMAS HAILE, by his next friend, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, by her next friend, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

THOMAS A. UZZELL, JR.
UZZELL AND DUMONT
311 Jackson Building
Asheville, North Carolina

W. NEIL THOMAS, JR.
FOLTS, BISHOP AND THOMAS
610 James Building
Chattanooga 2, Tennessee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO.

HENRY THOMAS HAILE, JR.; MELVIN THOMAS HAILE, by his next friend, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, by her next friend, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE

Petitioners

-vs-

THE EASTERN BAND OF CHEROKEE INDIANS, a corporation

Respondents

PETITION OF HENRY THOMAS HAILE, JR.; MELVIN THOMAS HAILE, by his next friend, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, by her next friend, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

The petitioners above named respectfully pray that a writ of certiorari issue directed to the United States Court of Appeals for the Fourth Circuit to the end that the Order and Judgment of that court affirming an Order of the United States District Court for the Western District of North Carolina dismissing this

action as to the defendant, The Eastern Band of Cherokee Indians, a North Carolina corporation, may be reviewed and corrected.*

It is, therefore, shown:

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in .....F (2) ....., and copy appended hereto as Exhibit No. 1. The Opinion of the United States District Court was not reported, but copy thereof contained in the Judgment of the District Court is appended hereto as Exhibit No. 2.

GROUNDS OF JURISDICTION

Jurisdiction is shown as follows:

The Judgment sought to be reviewed is a Judgment of the United States Court of Appeals for the Fourth Circuit, which was entered on the 13th day of July, 1957.

The jurisdiction of this Court to entertain this petition is based upon *28 U.S.C. 1254 (1).*

THE QUESTION PRESENTED FOR REVIEW

Whether or not the Eastern Band of Cherokee Indians, a North Carolina corporation, is suable in tort, without the consent of Congress, when it appears that the political organization of the Band operates under the corporate charter.

---

* Record references are to the Appendices filed by the Petitioners and the Respondents in the Court below, the Petitioners' Appendix being designated by the abbreviation "P.A.", and the Respondents' by the abbreviation "R.A."

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES INVOLVED

CONSTITUTION OF THE UNITED STATES, ARTICLE I, SEC. 8, in part, as follows:

> "The Congress shall have power . . . To regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes;"

TREATY OF NEW ECHOTA (1853) ARTICLE XII, as follows:

> "Those individuals and families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi and are desirous to become citizens of the States where they reside and such as are qualified to take care of themselves and their property shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements and per capita; as soon as an appropriation is made for this treaty.
>
> Such heads of Cherokee families as are desirous to reside within the States of No. Carolina, Tennessee and Alabama subject to the laws of the same; and who are qualified or calculated to become useful citizens shall be entitled, on the certificate of the commissioners to a pre-emption right to one hundred and sixty acres of land or one quarter section at the minimum Congress price; so as to include the present buildings or improvements of those who now reside there and such as do not live there at present shall be permitted to locate within two years any lands not already occupied by persons entitled to pre-emption privilege under this treaty and if two or more families live on the same quarter section

and they desire to continue their residence in these States and are qualified as above specified they shall, on receiving their pre-emption certificate be entitled to the right of pre-emption to such lands as they may select not already taken by any person entitled to them under this treaty.

It is stipulated and agreed between the United States and the Cherokee people that John Ross James Starr George Hicks John Gunter George Chambers John Ridge Elias Boudinot George Sanders John Martin William Rogers Roman Nose Situwake and John Timpson shall be a committee on the part of the Cherokees to recommend such persons for the privilege of pre-emption rights as may be deemed entitled to the same under the above articles and to select the missionaries who shall be removed with the nation; and that they be hereby fully empowered and authorized to transact all business on the part of the Indians which may arise in carrying into effect the provisions of this treaty and settling the same with the United States. If any of the persons above mentioned should decline acting or be removed by death; the vacancies shall be filled by the committee themselves.

It is also understood and agreed that the sum of one hundred thousand dollars shall be expended by the commissioners in such manner as the committee deem best for the benefit of the poorer class of Cherokee as shall remove west or have removed west and are entitled to the benefits of this treaty. The same to be delivered at the Cherokee agency west as soon after the removal of the nation as possible."

PUBLIC LAWS OF NORTH CAROLINA, 1866, Ch. 54, Sec. 1:

"That the Cherokee Indians who are now residents of the

State of North Carolina, shall have authority and permission to remain in the several counties of this State where they now reside; and shall be permitted to remain permanently therein so long as they may see proper to do so, anything in the Treaty of 1835 to the contrary notwithstanding."

ACT OF CONGRESS, July 27, 1868, 15 Stat. 228:

"July 27, 1868 — Chap. CCLIX — An Act to transfer to the Department of the Interior certain Powers and Duties now exercised by the Secretary of the Treasury in Connection with Indian Affairs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the powers and duties devolving upon the Secretary of the Treasury, under and by virtue of the fourth section of the act entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with the various Indian tribes for the year ending June thirtieth, eighteen hundred and forty-nine, and for other purposes," approved July twenty-ninth, eighteen hundred and forty-eight, and the powers and duties devolving upon him under and by virtue of the laws relating to the investment of the moneys in behalf of the Cherokee Indians, from the sales of land under the treaties concluded at Pontotoc, October twentieth, eighteen hundred and thirty-two, and at Washington City, May twenty-fourth, eighteen hundred and thirty-four, as also all other supervisory and appellate powers and duties in regard to Indian affairs, which may now by law be vested in the said Secretary of the Treasury, shall from and after the passage of this act be exercised and performed by the Secretary of the Department of the Interior.

Sec. 2. And be it further enacted, That the Secretary of the Interior shall cause a new roll or census to be made of the North Carolina or Eastern Cherokees, which shall be the roll upon which payments due said Indians shall be made.

Sec. 3. And be it further enacted, That hereafter the Secretary of the Interior shall cause the commissioner of Indian affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians. Approved, July 27, 1868."

ACT OF CONGRESS, March 3, 1871, 25 U.S.C. 71:

"No Indian Nation or Tribe within the territory of the United States shall be acknowledged or recognized as an independent Nation, Tribe or power with whom the United States may contract by treaty."

NORTH CAROLINA PRIVATE LAWS, 1889, Ch. 211, Sec. 1 and 2:

"The General Assembly of North Carolina do enact:

Section 1. That the North Carolina or Eastern Cherokee Indians resident and domiciled in the counties of Jackson, Swain, Graham and Cherokee, be and the same are hereby created and constituted a body politic and corporate under the name, style and title of "The Eastern Band of Cherokee Indians", with all the rights, franchises, privileges and powers incident and belonging to corporations under the laws of the State of North Carolina.

Section 2. That "The Eastern Band of Cherokee Indians" by that name and style, be and they are hereby authorized and empowered to sue and implead in law or in equity in

all courts of the land touching and concerning all the property of whatever nature held in common by the said North Carolina or Eastern Cherokee Indians in the said counties; and that the said "Eastern Band of Cherokee Indians", by that name and style, can and may be sued and impleaded in all the courts in the land touching and concerning the said property held as aforesaid in the said counties."

STATEMENT OF THE CASE

This is one of fifteen cases seeking damages for injuries or deaths of forty-one persons. By stipulation (P.A., 36) and Order (P.A., 41), it was determined that this suit should be treated as a test case, and that the results on appeal here would be binding in all of the other pending cases.

The plaintiffs instituted this action on the 3rd day of January, 1956, in the United States District Court for the Western District of North Carolina, for serious personal injuries occurring on the 3rd day of July, 1955, when a swinging bridge over the Oconaluftee River on the Cherokee Indian Reservation in Swain County, North Carolina, collapsed and precipitated them onto the rocks in the stream below. The case was instituted against Osley Bird Saunooke, Bertha Saunooke, the Eastern Band of Cherokee Indians, a corporation, and the United States in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof; however, only the Eastern Band of Cherokee Indians, a corporation, is named herein as Respondent.

The bridge had been constructed by the United States Government for the Eastern Band of Cherokee Indians, and was being utilized by the individual defendants as one means of access to their restaurant and gift shop. Numerous allegations of negligence are made against all of the defendants. Jurisdiction against the United States is predicated upon the Federal Tort Claims Act, *28 U.S.C., 1346(b)*. Jurisdiction against the individual defendants and The Eastern Band of Cherokee Indians, a North Carolina corporation, is based upon diversity of citizenship, *28 U.S.C. 1332(a)(1)*.

On May 4, 1956 (R., pg. 34) the United States in its capacity as trustee for and guardian of the Eastern Band of Chero-

kee Indians filed a motion to dismiss on the ground that it had not consented to be sued in that capacity. This motion was sustained by the District Court, and this was affirmed on appeal by the United States Court of Appeals, and this decision is not presented for review. The defendant, The Eastern Band of Cherokee Indians, a North Carolina corporation, made a Motion to Dismiss in the following words:

> "The defendant, the Eastern Band of Cherokee Indians, moves the Court to dismiss this action as to said defendant, the Eastern Band of Cherokee Indians, for the reason that the United States has not consented that this defendant, the Eastern Band of Cherokee Indians, may be sued; and, therefore, this Court lacks jurisdiction over the subject matter of this action and lacks jurisdiction over the person of this defendant, the Eastern Band of Cherokee Indians, and this Court is without jurisdiction to grant the relief sought by the Complaint in so far as the defendant, the Eastern Band of Cherokee Indians, is concerned."

On the 25th day of January, 1957 (P.A. 28), the Court entered an Order dismissing the action as to the Eastern Band of Cherokee Indians. This holding was affirmed on appeal by the United States Court of Appeals on July 13, 1957.

The allegations of the Complaint would indicate that the business sections of the Cherokee Indian Reservation in Swain County, North Carolina, adjacent to the Great Smoky Mountain National Park, have become a vast commercial enterprise, conducted by the Eastern Band of Cherokee Indians, a North Carolina corporation, and by individual Indians. By signs, posters, literature and other forms of advertisement, the public has been invited to the Reservation to view its exhibits and to purchase its merchandise. Pursuant to the invitation extended, the plaintiffs

visited the Reservation and were traversing the swinging bridge over the beautiful Oconaluftee River, which extended from a point adjacent to the main-travelled highway through the Great Smoky Mountain National Park across the river to a point where the individual defendants operated a restaurant and gift-shop, the bridge being one of the walks and ways on the Reservation where the public was invited to go. The bridge was constructed by the suspension of wire cables which were attached on either side of the river by hooks or eyelets. The weight of the traffic simply caused the eyelets to straighten out, resulting in the collapse of the structure.

In dismissing the action against the Eastern Band of Cherokee Indians, a corporation, the Court below held in effect that this corporation possessed sovereign immunity, and, therefore, could not be sued without the consent of Congress. In determining the question presented for review, the history of the North Carolina Cherokees and their relationship to the United States, and consequent status, become questions of fundamental importance. This history and the status of the North Carolina Cherokees has been covered in detail in the cases of *The Eastern Band of Cherokee Indians vs. the United States*, 117 U.S. 288, 29 L. Ed. 880 (1886) and *United States vs. Wright*, 53 F (2) 300. This history, for ready reference, is briefly summarized in the succeeding paragraphs.

The Cherokee Nation originally was in possession of large areas of land which are now located in North Carolina, Georgia, Tennessee and Alabama. By a series of treaties, culminating in the Treaty of New Echota (1835), the Cherokee Nation gave up its rights to these lands and moved West of the Mississippi. A few scattered individual Cherokees refused to move West, and remained in the mountains of North Carolina. The Treaty of New Echota provided that those Indians who were adverse to

moving West and who were able to take care of themselves, and who were "desirous to become citizens of the states where they resided" might remain in such states, and that they would receive their due portion of the "personal benefits" accruing under the Treaty. By Act of Congress (1868) *15 Stat. 228*, the Commissioner of Indian Affairs took supervisory charge over the North Carolina Indians, and the Government fostered and encouraged them in the development of a civilized life. By 1886 these individual Indians established a loose form of association for social and economic purposes and asserted their status as a part of the Cherokee Nation, and as such, entitled to the proportionate part of funds held by the Government for the Cherokee Nation. In the case of *The Eastern Band of Cherokee Indians vs. the United States*, supra, the Supreme Court rejected this contention, and fixed the status of these Indians as of that date (1886). In that case the Court refused to recognize the Eastern Band of Cherokee Indians as a "separate political organization", and held that they were not "a Nation in whole or in part", and that they were not "the successor of any organization recognized by any treaty or law of the United States".

Subsequent to this decision, and in 1889, the Cherokees sought and secured a charter from the State of North Carolina, incorporating them as a "body politic and corporate" under the style and title of "The Eastern Band of Cherokee Indians", with the right to sue and be sued, and possessing all the rights, franchises, privileges and powers incident and belonging to corporations under the State of North Carolina. By vote of the members of the Band, a charter under the Indian Reorganization Act of 1934 (*48 Stat. 984*) was refused, and today, their political organization functions by virtue of the State charter. The Eastern Band, prior to its incorporation, had purchased the land which is now contained within the Reservation at Cherokee, North Caro-

lina. In 1875 this land was conveyed by the Eastern Band to the Commissioner of Indian Affairs, and later was conveyed back to the Eastern Band of Cherokee Indians, a North Carolina corporation. Subsequently, in 1924, this property was conveyed by the corporation to the United States to be held in trust for the Indians. Thus, the United States has recognized the validity of the North Carolina corporation.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

The Circuit Court of Appeals for the Fourth Circuit Has, In This Case, Decided a Federal Question in a Way in Conflict with Applicable Decisions in This Court and Has Also Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

In 1886, this Court held that the Eastern Band of Cherokee Indians was not a Nation "in whole or in part". *The Eastern Band of Cherokee Indians vs. the United States*, 117 U.S. 288, 29 L. Ed. 880. In the instant case, the United States Court of Appeals holds that the Eastern Band of Cherokee Indians is a Nation, or Tribe, and is entitled to sovereign immunity.

Subsequent to the decision of this Court in 1886, the Executive Branch of the Government could not have recognized the Eastern Cherokees as an independent tribe or nation, for in 1871, Congress provided that:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."

Congressional Act of March 3, 1871 (25 U.S.C. 71).

This Court, in the case of *The Eastern Band of Cherokee Indians vs. the United States*, supra, described that Band in the following language:

> "The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political

organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a Constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that state and bound by its laws. As well observed by the Court of Claims, in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States but never recognized as a Nation in whole or in part. Nor is the Band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States."

It was subsequent to the foregoing decision that the Eastern Band of Cherokee Indians recognized that they had no political status, and, consequently, applied to the State of North Carolina for a charter which incorporated them into a "body politic incorporate".

No Act of Congress has endowed the North Carolina Cherokees with any of the attributes of sovereignty, nor has Congress exempted these Indians from tort liability. Congressional Acts relate only to contracts, alienation of property, and social welfare.

Many of the Indian tribes in the United States are entitled to raise the defense of sovereign immunity, but this does not apply, however, to the North Carolina Cherokees. The decisions of this Court, and, indeed, those of this Court which were relied upon and referred to by the Court below (R., 60), invariably recite or refer to the *former sovereign status* of the defendants as

being the basis of their immunity. The North Carolina Cherokees have never enjoyed any *former sovereign status*, and were "never recognized as a nation in whole or in part". The cases cited by the Court below in support of its decision are not applicable. In those cases, each of the tribes of Indians involved had enjoyed sovereign status, and had entered into treaties with the United States. Illustrative of this are the following:

United States vs. U. S. Fidelity & Guaranty Co., 309 U.S. 506 (1940), where this Court said:

> "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit."

Thebo vs. Choctaw Tribe of Indians, 66 F 372 (CCA 8, 1895:

> "It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian territory, so far as relates to suits against them, on the plane of independent states. . . . . The sovereign cannot be sued in its own courts or any other without its consent."

This Court held in 1831 that the *Cherokee Nation* was a sovereign state. *Cherokee Nation vs. State of Georgia*, 30 U.S. 1, 5. Pet. 1 (1831). This same Court in 1886 held that the *Eastern Band of Cherokees* was not a sovereign state, "in whole or in part": *Eastern Band of Cherokee Indians vs. United States*, supra. Only by reversing such holding, could the decision of the Court below be sustained. The opinion below quotes copiously from its decision in the case of *United States vs. Wright*, 53 F (2) 300 (CCA 4, 1931). This case, however, did not hold that the Eastern Band of Cherokee Indians was entitled to sovereign immunity. It held simply that the lands of these Indians which were

held in trust by the United States was not subject to taxation *because while those lands were held by the Government in trust, they became an instrumentality of the Government, which instrumentality could not be taxed.* And then, the idea of sovereign immunity was completely negatived by the Court below, when in the same opinion, it held:

> "So long as it (the land) was held by the Band in its corporate capacity, it was subject to taxation unless exempted by Congress."

None of the other cases cited in the opinion below support the proposition of sovereign immunity. *United States vs. Colvard*, 89 F (2) 312, (CCA 4, 1937), held only that the United States, legal title holder of the Indian land, as trustee, may enjoin trespasses thereon. *United States vs. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, North Carolina*, 97 F (2) 417 (CCA 4, 1938) held that title to such lands may not be established by adverse possession by another. *Blair, etc. vs. McAlhaney*, 123 F (2) 142 (CCA 4, 1941) and *United States vs. Parton*, 132 F (2) 886 (CCA 4, 1943) held that the Commissioner of Indian Affairs cannot be ordered by Court to grant a license to operate a store on the Indian lands.

It is true, as pointed out in the case of *The Eastern Band of Cherokee Indians vs. United States*, supra, that these Indians, "have been in some matters fostered and encouraged by the United States", but the duty of the United States in this respect does not rest upon the commerce clause of the Constitution.

> ". . . . Long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection of all dependent Indian communities within its borders. . . .

the power must exist in the Federal Government because it never has existed anywhere else. . . . ."
27 Am. Jur., 568, Sec. 42

See also *United States vs. Holliday*, 3 Wall. 407, 18 L. Ed. 182.

This duty to protect Indian communities, however, does not automatically endow them with sovereignty or immunity. The Alaskan Indians who remained in Alaska after the Russian-United States Treaty, ceding that territory, were held not to constitute an independent state or sovereign. *In re Sah Quah*, 31 F 327 (1886). In many respects, the situation of these Alaskan Indians resembles that of the Eastern Band of Cherokee Indians,

No immunity from suit arises by virtue of the fact that these Cherokee Indians are wards of the Government. The individual Indians are, likewise, wards of the Government, but they sue and are sued regularly in all courts, and, in fact, individual Indians are parties-defendant in this suit.

There exists no cogent reason why, just because the Eastern Band of Cherokee Indians are indeed Indians, they should not be liable for their wrongs. Legislation relating to contracts and alienation of property are to protect them against the advantages of a superior race, and from "the artful practices of designing men". However, these reasons could have no application in the situation presented here, for these plaintiffs have in no way taken any unfair advantage of the Indians. We suggest that even should Congress pass an Act attempting to relieve these Indians of tort liability under the laws of North Carolina, such an Act would not have a proper relationship to the purposes for which the Federal Government exercises its guardianship, and would properly be void. In *United States vs. Wright*, (4th Cir.) 53 F (2) 301, the Court said:

"On the first question, therefore, we think there can be no doubt that Congress has the power to legislate for the protection of the Eastern Band of Cherokee Indians and for the regulation of the affairs of the band. It is clear, however, that not every act of Congress with relation to the band would come within the power. *As heretofore stated, the members of the band, by separation from the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interferred with the exercise of the police power of the State. In such a situation, a law to be sustained must have relation to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states, i.e., it must have reasonable relation to their economic welfare.*" (Emphasis ours)

The present organization of the Band under the State charter appears to be a municipal corporation, and in the absence of Congressional Act to the contrary, is subject to suit under North Carolina law for negligence in maintaining its walks and ways.

Over three million people each year visit the Great Smoky Mountain National Park and the Reservation of the Eastern Band of Cherokee Indians. It can be anticipated that unfortunate accidents will re-occur. The ultimate Federal question of liability in tort has not been, but should be, finally settled for the protection of the public.

CONCLUSION

As demonstrated herein, the decision of the Court below in respect to principles relating to immunity from suit is, in several particulars, in direct conflict with the decision of this Court. The tort liability of the Eastern Band of Cherokee Indians, a North

Carolina corporation, has not been, but should be, finally determined. In view of the exposure of persons who, in increasing numbers, are going upon this Reservation, there is need for a definitive statement from this Court with respect to whether or not the corporate defendant enjoys any sovereign immunity.

Respectfully submitted,

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by his next friend,
Henry Thomas Haile, Jr.
CAROLYN DARLENE HAILE,
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APPENDIX A

(Exhibit No. 1)

Opinion of the Court of Appeals for the Fourth Circuit

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, *Circuit Judges.*

PARKER, Chief Judge:

This is an action to recover damages for personal injuries sustained from the collapse of a swinging bridge over the Oconaluftee River on the Cherokee Indian Reservation in Swain County, North Carolina. The plaintiffs are citizens of Tennessee who were on a visit to the reservation and who were crossing the bridge to reach a tourist attraction operated by Osley Bird Saunooke and his wife, members of the Eastern Band of Cherokee Indians. Saunooke and wife were named as defendants in the action along with the Eastern Band of Cherokee Indians and the United States "in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof." The District Judge dismissed the action against the Eastern Band of Cherokee Indians and against the United States as trustee for and guardian of the band and the individual members thereof, but retained the action against the individual defendants and against the United States, other than as trustee and guardian, and allowed the United States additional time within which to plead to the complaint. He signed an order under Rule 54 (b) severing from the action for purposes of appeal the cause of action as to which dismissal was entered, so as to allow immediate appeal from the order of dismissal and the plaintiffs have appealed therefrom.

It is to be noted that the action was not dismissed as to the individual defendants nor as to the United States, which might be liable under the Federal Tort Claims Act, upon a proper showing

of negligence on the part of its employees in the construction or maintenance of the bridge; but the dismissal extended only to the cause of action asserted against the Eastern Band of Cherokee Indians and against the United States as trustee or guardian for them. As recovery is sought against the United States under the Federal Tort Claims Act for negligence of its employees in connection with the bridge, it is clear that the suit against it in its capacity as trustee for or guardian of the Indians could only be for the purpose of notifying it to defend the suit for them pursuant to Rule 17(c) of the Rules of Civil Procedure, or for the purpose of rendering any judgment which might be entered in the cause binding with respect to the property of the Indians which the government held for them as trustee or guardian.

It is well settled that the Eastern Band of Cherokee Indians is an Indian Tribe within the meaning of the Constitution and laws of the United States. In *United States v. Wright* 4 Cir. 53 F. 2d 300 we went carefully into the history of this remnant of the Cherokees of North Carolina and showed how they had acquired the lands upon which they were living and had reacquired their status as an Indian Tribe under the protection of the Government of the United States. We made reference to their recognition as a tribe by Congress in the Act of July 27, 1868, saying:

> "By the purchases of Thomas, therefore, this Eastern Band of Cherokees had acquired the right to the possession of a large boundary of land in North Carolina, and by the North Carolina statute of 1866 they had acquired, with the approval of the government of the United States, permission to remain permanently in that state. Their economic status had thus been practically restored to what it was prior to the Treaty of New Echota; and Congress in the act of July 27, 1868, 15 Stat. 228, recognized this status by providing that

the Secretary of the Interior should cause a new roll or census to be made 'of the North Carolina or Eastern Cherokees,' and that thereafter the Secretary of the Interior should 'cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees *as of other tribes of Indians*'. (Italics ours)."

We pointed out how the lands of these Indians had been conveyed by the Commissioner of Indian Affairs to the corporation created by the Legislature of North Carolina under a decree which provided that nothing therein should "be construed as interfering with the right of the Commissioner of Indian Affairs from exercising such supervisory charge over the person and property of said band of Indians and the members thereof and the contracts of said Indians as that officer now has by virtue of the Constitution of the United States and the treaties and laws in pursuance thereof." We pointed out also that the deed of the Commissioner of Indian Affairs contained the same proviso and that the title remained in the corporation until conveyed to the United States on July 21, 1925 pursuant to the provisions of the Act of June 4, 1924. With respect to the guardianship exercised over this band of Indians by the United States, we said:

"Not only with respect to the acquisition and preservation of the title to this land, but also in practically every other way imaginable, the government of the United States from 1868 to the present day has continuously guarded and protected the interests of this band of Indians, and has done everything possible to promote their progress and development. It has supervised their contracts and instituted suits for the cancellation of contracts which were thought not advantageous to them. *U.S. v. Boyd* (C.C.) 68 F. 577; Id. (C.C.A.) 83 F. 547. It has appointed agents to guide them in the management of their affairs. It has built schools, including

a large boarding school, and provided teachers for the education of their children. It has provided an experienced farmer to go among them and teach them the arts of agriculture. It has provided a hospital for the care of their sick, and has made provision for the care of their deaf, dumb, blind, and insane. It has provided a physician and a field nurse to go among them and care for the sick in their homes. It has furnished food and clothes for their school children, and has made allowances to members of the tribe to aid in their support. In other words, it has for more than sixty years treated them in all respects as wards of the nation, and has expended in recent years more than $100,000 annually for their support. It appears that for the fiscal year 1930 the appropriation for this purpose was approximately $135,000.

". . . . the life of this band of Indians, from an economic standpoint, both in its relation to the federal government and to the state, has been for more than sixty years practically that of other Indian tribes. Politically they have been subject to the laws of the state, but economically they have been wards of the federal government and cared for as such under the provisions of its laws."

The court expressly answered the argument, now made again, that the Eastern Band of Cherokee Indians had lost their status as an Indian Tribe by reason of their separation from the main body of the Cherokees that had gone to the Indian Territory, saying:

"The fact that the Eastern Band of Cherokee Indians had surrendered the right to their tribal lands, had separated themselves from their tribe, and had become subject to the laws of the state of North Carolina, did not destroy the right

or the duty of guardianship on the part of the federal government. The fact that they constituted a community of these aboriginal people who were wards of the government was sufficient basis for the exercise of the power; and to what extent the power should be exercised was for Congress to decide. Even the conferring of citizenship upon the Indians and allotment of lands to them in severalty does not place them beyond the reach of congressional regulations ~~adopted for their protection. UNITED STATES v. SAN-~~ adopted for their protection. *United States v. Sandoval*, supra; *Tiger v. Western Inv. Co.*, 221 U.S. 286, 31 S. Ct. 578, 55 L. Ed. 738; *Heckman v. U.S.*, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820; *U.S. v. Nice*, 241 U.S. 591, 36 S. Ct. 696 60 L. Ed. 1192; *Brader v. James*, 246 U.S. 88, 96, 38 S. Ct. 285, 62 L. Ed. 591. And the principle is well settled that whether the protective and regulatory power of Congress shall be extended over an Indian community is a political question with the determination of which the courts have no power to interfere. *United States v. Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *Tiger v. Western Inv. Co.*, supra; *United States v. Sandoval*, supra; *Sisseton & Wahpeton Bands of Sioux Indians v. U.S.*, supra.

* * *

"In this case there can be no question but that the Eastern Band of Cherokee Indians is a distinctly Indian community. Congress for more than half a century has recognized it as such, and has extended to it the guardianship and protection of the government. In the opinion of Assistant Attorney General Campbell in 1901 approved by Secretary Hitchcock (copied in the record at pages 117-141) is contained a summary of the acts of Congress passed up to that time for the care and protection of the band, and the Assistant Attorney

General thus summarizes his conclusions with regard thereto: 'From the foregoing necessarily prolix recitals it is manifest that the government has all along exercised a supervisory control over this band of Indians both in matters growing out of the treaties with the Cherokee Nation proper and the relations of the band itself involving the approval and disapproval of deeds and contracts with respect to the acquisition and sale of their lands and the disposal of the timber thereon. Since 1868, under specific legislation, the same supervisory charge has been taken of the Eastern Band of Cherokee Indians of North Carolina as of other tribes of Indians. There is nothing in recent legislation nor in the decrees of the courts to warrant the adoption of a different course or policy in regard to them. On the contrary the courts fully recognize such authority and decline to interfere with its exercise, thus conceding that it exists nowhere else."

In *United States v. Boyd* 4 Cir. 83 F. 547, 555, this court dealt with a suit instituted by the United States to declare void a timber contract entered into by the band. In holding that even in the absence of fraud a contract not approved by the Department of the Interior would not be enforced, Judge Goff, after reciting various acts of Congress showing that the government was exercising the right of guardianship over the affairs of the band, said:

"This shows that the original condition of the Indians in this country — that of pupilage under the government — has not been released, so far as this Eastern Band of Cherokees is concerned. It thus appears that the political departments of the government have recognized these Indians as constituting a tribe, — at least, within the meaning of that word as it is used in the constitution of the United States; and it

> is a rule of the courts, in matters of this kind, to follow the action of the executive and the departments whose duty it is to determine such affairs."

For other decisions of this court holding the Eastern Band of Cherokee Indians to be an Indian tribe within the meaning of the Constitution and Laws of the United States, see *United States v. Coltard* 1 Cir. 89 F. 2d 312; *United States v. 7,405.5 Acres of Land in Macon, Clay and Swain Counties, North Carolina, Et Al.* 1 Cir. 97 F. 2d 117; *Blair, Superintendent of the Cherokee Agency v. McAlhaney* 1 Cir. 123 F. 2d 142; *United States v. Parton* 1 Cir. 132 F. 2d 886.

The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument. *Thebo v. Choctaw Tribe of Indians* 8 Cir. 66 F. 372; *Adams v. Murphy* 8 Cir. 165 F. 304, 308; *Turner v. United States* 248 U.S. 354, 358; *United States v. U.S. Fidelity & Guaranty Co.* 309 U.S. 506. In the case last cited the Supreme Court said:

> The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.

In *Rollins v. Eastern Band of Cherokee Indians* 87 N.C. 229, the Supreme Court of North Carolina rendered a decision to the same effect, refusing to entertain a suit against this very band of Indians on the ground that they were under the guardianship of the federal government. The court said of the Act of Congress of July 15, 1870, c16 Stat. 362, sec. 11, that, if it did

not confer, it recognized a corporate capacity in them as a collective body or tribe. It said further: "The remnant band of Cherokees remaining in the state, by distinct legislative action, have been placed upon the same footing with other Indian tribes, under the protection and care of the government, and these statutory provisions (i.e. those for the protection of Indians) apply with equal pertinency and force to them as to that portion of the tribe who have emigrated and been located in their western home. . . . It is obvious that the Indian tribes are in a state of pupilage to the general government, and the safeguards of law are placed over them to secure them and their property from the artful practices of designing men, the dictate of an enlightened sense of national duty to the weak and defenseless of a race rapidly diminishing in numbers, and deemed incapable of self-protection."

The arguments offered in support of the right to sue this band of Indians, either directly or through the United States as trustee and guardian, merit but brief answer. It is said that the right to sue the band is given by the act of the Legislature of North Carolina incorporating the band; but it is perfectly clear that an act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn. See *Tiger v. Western Investment Co.* 221 U.S. 286; *United States v. Nice*, 241 U.S. 591; *Brader v. James* 246 U.S. 88; *United States v. McGowan* 302 U.S. 535, 538; *Board of Commissioners v. Seber* 318 U.S. 705. . .

In the absence of consent by Congress that these wards of the government be sued, it is not permissible to accomplish the same result indirectly by suing the United States as trustee or guardian for them. *Turner v. United States, supra*, 248 U.S. 354,

359. There is nothing in the federal Tort Claims Act which authorizes any such suit. That Act authorizes suit against the government for damages caused by an employee of the government acting within the scope of his office or employment, not a suit against wards of the government nor against the government as their guardian for damages resulting from their acts, and the position of plaintiffs is not helped by reference to the Uniform Trusts Act. G.S. of North Carolina 36-37. Aside from the fact that the Uniform Trusts Act does not purport to render the trustee liable for the torts of the cestui que trust, it is clear, as pointed out above, that only Congress can determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn.

The suit against the Eastern Band of Cherokee Indians and against the government in its capacity as guardian or trustee was properly dismissed; but, as heretofore stated, this will not preclude plaintiffs from proceeding against the individual defendants, nor against the government itself, if they can show damages resulting from any negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment.

Plaintiffs contend that they are entitled to judgment by default against the United States in its sovereign capacity; but that question is not before us on the appeal from the order of dismissal and is without merit in any event, as the trial judge was acting well within his discretion in extending the time of the United States to file answer until after the questions raised by this appeal should be decided.

Affirmed.

APPENDIX A

(Exhibit No. 2)

Judgment and Order of the United States District Court for The Western District of North Carolina

This cause, coming on to be heard before the undersigned United States District Judge upon the motion of the Defendant, the Eastern Band of Cherokee Indians, to dismiss this action as to said Defendant, and being heard, the Court, after hearing argument of Counsel for the Plaintiffs and the said Defendant, and after considering the Complaint of the Plaintiffs, the motion of the Defendant, and the Affidavits referred to in said motion, being the Affidavits of Glenn L. Emmons, United States Commissioner of Indian Affairs, the Affidavit of W. Barton Greenwood, Assistant Commissioner of the Bureau of Indian Affairs, and the Affidavit of D. Otis Beasley, Administrative Assistant Secretary of the Department of the Interior, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) That by this action the Plaintiffs seek recovery of damages from the Defendants for injuries to the Plaintiffs resulting from the collapse on July 5, 1955, of a certain bridge across the Oconaluftee River, located on the Qualla Boundary of the Eastern Band of Cherokee Indians in Swain County, North Carolina. The legal title to said Qualla Boundary upon which said bridge was located was on said date, and still is, vested in the United States in trust for the Eastern Band of Cherokee Indians by virtue of a deed of conveyance executed by the Eastern Band of Cherokee Indians to the United States, which deed bears date July 21, 1925, and was executed by the Indians and accepted by the United States under the provisions of Act of Congress passed on June 4, 1924 (43 STAT. 376).

(2) That prior to 1835 the Cherokee Indian Tribe lived in large areas of what are now the States of Tennessee, North Carolina, South Carolina, Alabama and Georgia. By successive treaties beginning with the Treaty of Hopewell in 1785 (7 STAT. 18) and ending with the Treaty of New Echota in 1835 (7 STAT. 478) the possessory right of the Cherokee Tribe over lands in North Carolina was gradually extinguished and all such land was made subject to grant by North Carolina. By the Treaty of New Echota the Tribe agreed to remove from North Carolina westward beyond the Mississippi in consideration of a payment of money by the United States and a grant of land beyond the Mississippi. A large number of Cherokees were moved as a result of the Treaty of New Echota by the United States Government to new lands West of the Mississippi. However, a number of the North Carolina Cherokees were permitted to remain in North Carolina in accordance with Article 12 of the Treaty of New Echota and others hid in the mountains of Western North Carolina and were not moved. By treaty with the Cherokee Indians in 1846 (9 STAT. 871) the United States recognized certain rights in the Cherokees then residing East of the Mississippi River as follows:

> "Article 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in states East of the Mississippi River had, or may have, under the Treaty of 1835 and the supplement thereto."

The Congress of the United States more specifically recognized the rights of the Cherokees residing in North Carolina by Act of July 29, 1848 (9 STAT. 264), which made provision for taking a census of the North Carolina Cherokees and the payment of certain per capita payments. In accordance with this Act

the first authentic role of the Eastern Cherokees residing in North Carolina subsequent to the Treaty of 1835 was made and the number entitled to enrollment found to be two thousand one hundred thirty-three. Subsequently, by Act of July 27, 1868 (15 STAT. 228) the Congress of the United States directed the Secretary of the Interior to have a new role of the North Carolina Cherokees prepared and Section 3 of this Act provided as follows:

> "And be it further enacted, that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

Following enactment of this Act the Commissioner of Indian Affairs on November 7, 1868, by letter, advised the Cherokee Indians in North Carolina to organize themselves into a tribal capacity and elect their own officers, and the Eastern Cherokees shortly thereafter on December 9, 1868, at Cheoa, North Carolina, set forth a declaration establishing a simple form of tribal government. Subsequently and on October 13, 1875, at Cheoa Council Ground, the Eastern Band of Cherokee Indians approved a constitution known as the Welch Constitution, which provided for a Tribal Council and the number and qualifications of the members of the Council, a Principal Chief, a Vice Chief, other tribal officials, and the composition of the executive council, and specified that the annual council should be held on the first Monday in October. The Welch Constitution was in operation until the State of North Carolina passed Chapter 211 of the Private Laws of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes." This Act was subsequently amended by Chapter 166 of the Private Laws of 1895, Chapter 207 of the Private Laws of 1899, Chapter 128 of the Private Laws of 1931 and Chapter 39 of the Private Laws of 1933. The Eastern Band of Cherokee Indians has, as provided

in the State Charter, elected a Principal Chief, a Vice Chief and a Tribal Council and these officials have directed the business and affairs of the Eastern Band of Cherokee Indians in accordance with tribal ordinances and resolutions adopted by the Tribal Council and approved by the United States Indian Office. By election held on December 20, 1934, the Eastern Band of Cherokee Indians voted by a vote of 700 affirmative votes to 101 negative votes to accept the provisions of the Indian Reorganization Act of June 18, 1934, (48 STAT. 984). On August 28, 1935, the Eastern Band of Cherokee Indians voted 381 for and 484 against accepting a constitution and by-laws in accordance with Section 16 of that Act.

(3) That subsequent to the Act of July 27, 1868 (15 STAT. 228) the Congress of the United States has enacted many other Statutes relating specifically to the Eastern Band of Cherokee Indians and recognizing their status as an Indian Tribe. As provided in Section 3 of that Act, the Secretary of the Interior has caused the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern Band of Cherokee Indians as of other tribes of Indians. Continuously since the enactment of the Act of July 3, 1868 (15 STAT. 228) until the present time, the Government of the United States, by successive Acts of the Congress of the United States, and by repeated actions of its Executive Branch, acting particularly through the Bureau of Indian Affairs, has recognized the Eastern Band of Cherokee Indians as an Indian Tribe in all respects exactly as other Indian Tribes. Consistently and continuously since that date the legislative and executive branches of the Federal Government have dealt with and exercised supervision over the Eastern Band of Cherokee Indians in the same manner and to the same extent as over other Indian Tribes. The United States Government holds title to their lands and holds their funds in its treasury as trustee for these Indians.

Appendix A

The United States Government maintains an Indian Agency at Cherokee, North Carolina, with a Superintendent in charge thereof under the Bureau of Indian Affairs. The Congress has appropriated substantial Federal funds to be available each year to the Cherokee Indian Agency to pay the costs of administration, education of the Indians, forestry, soil conservation, construction and maintenance of roads and buildings and other purposes for the welfare of these Indians. These various programs for the fiscal year 1956 will cost approximately $650,000.00 in Federal funds. Through the Cherokee Indian Agency the United States Bureau of Indian Affairs has dealt with the Tribal Authorities of the Eastern Band of Cherokee Indians and has exercised supervisory control over their affairs in such matters as the management and conservation of their resources, the appointment of tribal attorneys, the safe-guarding of Indian lands, the granting of traders' licenses, the making of tribal membership roles, and other matters affecting the welfare of these Indians. Expenditures from the tribal funds of these Indians which are held in the United States Treasury in trust for their benefit are made only after the Tribal Council has adopted a budget for this purpose, which budget has been approved by the Superintendent of the Cherokee Indian Agency and the Bureau of Indian Affairs, submitted to the Federal Bureau of the Budget, and finally authorized by Act of Congress as part of the general budget of the President of the United States for operation of the Federal Government. By these and many other actions both the Congress of the United States and the Executive Branch of the Federal Government have over a long period of years and continuing to the present time dealt with and recognized the Eastern Band of Cherokee Indians as an Indian Tribe within the meaning of the Constitution and Laws of the United States.

(4) That the Congress of the United States has not passed

any Act or otherwise taken any action giving its consent that this action may be brought against the Eastern Band of Cherokee Indians.

CONCLUSIONS OF LAW

(1) That the political departments of the Federal Government recognize the Defendant, the Eastern Band of Cherokee Indians, as constituting an Indian Tribe, and it is a rule of the Courts, in matters of this kind, to follow the action of the Congress and the Executive Departments whose duty it is to determine such affairs. Applying this principle, it has now been conclusively established by a long line of decisions of the Circuit Court of Appeals that the Defendant, the Eastern Band of Cherokee Indians, is an Indian Tribe within the meaning of the Federal Constitution and the laws of the United States. *United States vs. Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States vs. Wright*, 53 F. (2d) 301 (C.C.A. 4th, 1931); *United States vs. Colvard*, 89 F (2d) 312 (C.C.A. 4th, 1937); *United States vs. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, North Carolina, Et Al.* 97 F. (2d) 417 (C.C.A. 4th, 1938); *Blair, Superintendent of the Cherokee Indian Agency vs. McAlhenny*, 123 F. (2d) 142 (C.C.A. 4th, 1941); *United States vs. Partin*, 132 F. (2d) 886 (C.C.A. 4th, 1943).

(2) That Chapter 211 of the Private Laws of North Carolina of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes," as subsequently amended by other Acts of the General Assembly of North Carolina, is operative only in so far as it does not conflict with the rights conferred upon the Eastern Band of Cherokee Indians by the Constitution and Laws of the United States and only in so far as it does not interfere with the supervisory control which the Federal Government exercises over this Indian Tribe. Since the

Federal Government has plenary power and control over this Indian Tribe, the State of North Carolina is without power by Act of its Legislature to authorize suit to be brought against the Defendant, the Eastern Band of Cherokee Indians, or in any other manner to interfere with Federal control over its affairs. *United States vs. Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States vs. Wright*, 89 F. (2d) 312 (C.C.A. 4th, 1931).

(3) That the Congress of the United States can alone authorize a suit to be brought against an Indian Tribe and that the Defendant, the Eastern Band of Cherokee Indians, is exempt from suit without such congressional authorization. As was said by the Supreme Court of the United States in the case of *United States vs. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940):

> "The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."

See also *Thebo vs. Choctaw Tribe of Indians*, 66 Fed. Rep. 372 (C.A. 8th, 1895), and *Rollins vs. The Eastern Band of Cherokee Indians*, 87 N.C. 229 (1882).

(4) That since Congress has not given its consent that the Eastern Band of Cherokee Indians may be sued in this action, this action must be dismissed as to such defendant.

IT IS NOW THEREFORE, ORDERED AND AD-

JUDGED that this action be and the same is hereby dismissed as to the Defendant, the Eastern Band of Cherokee Indians.

THIS 25th day of January, 1957.

/s/ WILSON WARLICK
United States District Judge
for the Western District of
North Carolina